

TRADE REGULATION--VIOLATION--ISSUE OF DISCRIMINATORY PRICING.¹
N.C.G.S. § 75-5(b) (5) .

NOTE WELL: Use this instruction only with claims for relief arising before October 1, 1996. Session Laws 1995 (Regular Session 1996), c. 550, s. 2 repealed N.C.G.S. § 75-5 effective October 1, 1996.

The (state number) issue reads:

"Did the defendant,² while dealing in goods within this State, and with the intent to injure the business of a competitor, [sell] [contract to sell] such goods at one place for a price lower than he charged for the same type of goods at another place without a good and sufficient reason?"

¹Apparently, the purpose of G.S. § 75-5(b) (5) is to prevent a seller with several distribution points from predatorily lowering his prices in one locality where he has competition, while maintaining his prices at another locality in order to continue to generate an acceptable overall profit margin, thereby destroying his competitor in the low priced locality." *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 654, 194 S.E.2d 521, 529 (1973).

This statute applies only to price discrimination in the "primary line," i.e., where the seller engages in price discrimination to drive its competitors out of business. The statute does not apply to price discrimination in the "secondary line," i.e., where a seller offers different prices to two different retailers and one of the retailers gets a competitive advantage over the other. The "primary line" is the line of competition between the seller and his competitors; the "secondary line" is the line of competition among the persons who purchase from the seller and are in competition with each other, but not with the seller. *Id.*

A contract, combination or conspiracy which creates price discrimination in the secondary line might violate G.S. § 75-1 if it constitutes an unreasonable restraint on trade. *Id.* (See N.C.P.I.--Civil 813.20.)

In a treble damages action this instruction should be given in conjunction with N.C.P.I.--Civil 813.70, "Issue of Proximate Cause," and N.C.P.I.--Civil 813.80, "Issue of Damages."

²Under the statute defendant must be a "person." "Person includes any person, partnership, association or corporation." G.S. § 75-5(a) (1) .

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On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, four things:

First, that the defendant dealt in (*describe goods*)³ within this State.

Second, that the defendant [sold]⁴ [contracted to sell]⁵ (*name goods*) at one place for a price lower than he charged for the same type of goods at another place.

Third, that the defendant did not have a good and sufficient reason for charging less for (*name goods*) at the one place than at the other. In determining whether the defendant had a good and sufficient reason, you must consider whether the price difference was due to either

(1) a difference in the cost of transporting the goods to the separate locations; or

(2) a difference in the expense of doing business in the separate locations.

Fourth, that the defendant charged less for (*name goods*) at

³"Goods include goods, wares, merchandise, articles or other things of value." G.S. § 75-5(a)(2).

⁴The statute also prohibits giving away goods as well as selling them for a lower price. If the defendant gave away the goods then the instruction should be modified accordingly.

⁵G.S. § 75-5(b) makes it unlawful to "have a contract expressed or knowing implied" to violate § 75-5. If this is an issue, then it may be necessary to define contract. See N.C.P.I.--Civil 500.00 et. seq.

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the one place than at the other with the intent⁶ to injure the business of *his* competitor. Competitors sell or attempt to sell the same or similar goods to the same type of purchasers or customers in the same geographic area.⁷

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence, that the defendant, while dealing in (*name goods*) within this State and with the intent to injure the business of a competitor, [sold] [contracted to sell] such goods at one place for a price lower than *he* charged for the same type of goods at another place without a good and sufficient reason, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

⁶This statute only applies when the price discrimination occurs "with a view to injuring the business of another." N.C.G.S. § 75-5(b)(5). The statute is "aimed at *predatory area discrimination* in the primary line." *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 654, 194 S.E.2d 521, 529 (1973) (*emphasis in original*). Therefore, if a person engages in price discrimination for a purpose other than driving competitors out of business, e.g., charges less in a competitive area in order to meet the competitive price, then such conduct would not violate the statute.

Generally, the intent of the defendant will be a question of fact for the jury.

⁷The injury must be to one of the defendant's competitors. This statute only applies to price discrimination in the primary line. *Rose*, 282 N.C. at 654, 194 S.E.2d at 529. See, footnote 1.

